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THE SUPREME COURT

Filed March 20, 1899.

UNITED STATES.

OCTOBER TERM, 1898.

W. H. BLACKBURN,
Plaintiff in Error.
vs.
THE PORTLAND GOLD MINING COMPANY AND W. S. STRATTON,
Defendants in Error.

No. 275.

Error to the Circuit Court of the United States for the District of Colorado.

BRIEF AND ARGUMENT OF DEFENDANTS IN ERROR.

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This case was commenced in the Circuit Court of the United States on the 27th day of August, A. D. 1897. So far as the issue in this court is concerned, it presents only a question of jurisdiction. The jurisdiction of the United States Court was invoked upon the two grounds of diverse citizenship and the presence of a Federal question.

The defendants appeared and filed a motion to dismiss the action upon the ground of no juris-

diction, because it appeared upon the face of the complaint that it was not a suit between citizens of different states nor was it one arising under the constitution and laws of the United States. This motion was argued before the Circuit Court on the 8th day of November, 1897, was sustained, and the cause dismissed. A writ of error was then sued out to the Circuit Court of Appeals for the Eighth Circuit. This writ, upon the motion of defendants in error, was dismissed, for the reason that the Circuit Court of Appeals had no right to review a final judgment of a circuit court dismissing a cause for want of jurisdiction.

Blackburn vs. The Portland Gold Mining Co., 89 Fed. Rep., 1013.

Upon the filing of the motion to dismiss the writ of error to the Circuit Court of Appeals, the plaintiff sued out another writ of error to this court, so that two writs were pending at the same time, one to the Circuit Court of Appeals for the Eighth Circuit, and the other to this court. The writ to this court is dated the 17th of March, 1898, and is the one which is before the Court for disposition at this time.

But three questions are presented by the record:

First.—Is this a suit wholly between citizens of different states?

Second.—Does the matter in dispute exceed the sum or value of two thousand dollars? and

Third.—Is this a suit arising under the laws of the United States?

We will take these questions up in the order indicated.

I.

Is this a suit w'holly between citizens of different states?

The allegations of the complaint are that this is a suit between citizens of different states, in that the complainant, W. H. Blackburn, is a citizen of the State of Colorado; the defendant, The Portland Gold Mining Company, is a corporation organized under the laws of the State of Iowa, and that the defendant, Stratton, is a citizen of the State of Colorado. Under this allegation, of course, the Federal courts would have no jurisdiction, the plaintiff being a citizen of Colorado, and one of the defendants being also a citizen of that state. But the plaintiff, in the fourth paragraph of his complaint, attempts to avoid this difficulty by an allegation that the defendant, Stratton, is not a real party in interest, and that, therefore, the controversy is really one between the plaintiff Blackburn, a citizen of Colorado, and the defendant, The Portland Gold Mining Company, a corporation organized under the laws of the State of Iowa. But an examination of the allegations of the complaint, and a reference to the character of the action, will show that no such condition of affairs exists.

The complaint is one in ejectment, brought under the Colorado Code, and in support of an adverse claim filed in the land office. The defendant, Stratton, applied for a patent from the Government of the United States upon the Fairplay lode mining claim, in accordance with Sec. 2325 of the Re-

vised Statutes. The application was made in the United States Land Office at Pueblo, Colorado. The complaint avers that this application was made by Stratton in his own name. Section 2325 provides that any person, association, or corporation, authorized to locate a mining claim, having claimed and located a piece of land for such purpposes, and having complied with the terms of that chapter, may file in the proper land office an application for patent, under oath, which application must show a compliance with the law, and must be accompanied by a plat or map of the claim, made under the directions of the United States Surveyor-General; that he shall post a copy of such plat, together with his notice of application, upon the ground for a period of at least sixty days; that the Register of the Land Office shall then publish a notice of such application in a newspaper published nearest to the claim, which said notice shall be published for sixty days, and that the notice of the application shall also be posted in the office of the Register; that at the end of sixty days the applicant is entitled to his patent, if no adverse claim is filed. The complaint in this case alleges that within the sixty days above provided an adverse claim was filed by the plaintiff, and that this suit is brought in support of the same. Section 2326 provides that where an adverse claim is filed it must be upon the oath of the person filing it and that the land office shall then suspend any action until the controversy shall have been settled by a court of competent jurisdiction. The adverse claimant must within thirty days commence his suit in a court of competent jurisdiction to determine the question of the right of possession.

It is clear from these provisions that the applicant for the patent is the real party in interest and is a necessary party to any suit which may be brought. The plaintiff recognizes this position by making Mr. Stratton, the person who filed the application for patent, a defendant, but he also alleges that the said Stratton is not the real owner of the ground nor did he have any interest or title whatsoever therein, but that long prior to his application for a patent he had made and executed a deed of the Fairplay lode mining claim to the defendant, The Portland Gold Mining Company. It is for this reason that it is contended that the suit is really one between the plaintiff, Blackburn, and the defendant, The Portland Gold Mining Company. No such conclusion, however, can be deducted either from the allegations of the complaint or the statutes to which we have called attention. It is very evident from the terms of the statute that the controversy which the United States desires settled before it will issue a patent is one between the party who files this application for a patent and the person who files his adverse claim. It is undoubtedly a good ground to set up in a suit as a part of a cause of action that a person who has applied for a patent is not the real owner of the property. This might defeat his application for patent because the statute contemplates that only a person who is the owner of the claim and who has complied with the law shall be entitled to a patent. But this is an entirely different proposition from asserting that because the person who has applied for a patent is not the real owner that an adverse suit can be maintained between the person filing the adverse

claim and the real owner of the property, and that the applicant for a patent is not a necessary party thereto.

The Court below held, although the opinion is not set out in the record, that the only parties to a controversy of this kind were the applicant for the patent and the adverse claimant, and that the plaintiff had no right to bring in any other defendants. This rule is undoubtedly correct. The plaintiff has the right to allege in his complaint that the applicant for patent has parted with his interest, that the application is not made in compliance with the law, and, therefore, his adverse claim should be sustained. But this does not give him the right to bring in as a party defendant the person to whom he claims the defendant has conveyed his title. In other words, it is a question not of parties, but of the right of the applicant for a patent to have the same issued. In this view of the case the parties to this controversy, and the only parties to be recognized in law, are W. H. Blackburn, the adverse claimant, and W. S. Stratton, the applicant for the patent. As both of these gentlemen, under the allegations of the complaint, are citizens of the State of Colorado, the suit is one between citizens of the same state, and over which the Federal courts have no jurisdiction.

II.

Does the matter in dispute exceed the sum or value of two thousand dollars?

The complaint in this case does not show that the amount in controversy or the value of the

property involved exceeds the sum of two thousand dollars. The first allegation of the complaint is that the *amount in dispute in this cause* exceeds, exclusive of interest and costs, the sum of two thousand dollars. This is either a mere conclusion of law or a reference to the money involved, and no facts are afterwards averred which show that as a matter of fact, this amount of money, or property of that value, is in controversy. The subsequent allegations are that the defendant, Stratton, applied for a patent upon the Fairplay lode; that the plaintiff is the owner of the Echo lode, and the defendant entered upon a portion of said Echo lode and ousted the plaintiff therefrom. The portion is then described by metes and bounds. There is no allegation that this tract of land has any value whatever. It is described as containing 10.331 acres. The complaint then alleges that the defendants wrongfully withhold possession of said parcel of the Echo claim to the plaintiff's damage in the sum of one thousand dollars, and that in the preparation of the adverse claim the plaintiff expended the sum of three hundred dollars. The prayer of the complaint is that judgment be given the plaintiff that he is the owner of and entitled to the possession of said tract of land; that he recover from the defendant one thousand dollars damages for the detention, and three hundred dollars expended on behalf of said adverse claim. Thus we have an allegation that the matter in dispute exceed two thousand dollars, which is a conclusion of law, and when allegations of fact are set forth statements that the plaintiff has only suffered damages to a total of thirteen hundred dollars.

So far as the value of the property is concerned there is no allegation of any kind, nature, or description. The acreage is set forth, and this alone will furnish the only evidence of its value. The Court will take judicial knowledge of the fact that the Government sells its mineral lands at five dollars per acre. Ten acres of mining land would be worth fifty dollars. So that, taking the positive allegations of the complaint, and the value of the land as measured by the Government of the United States, there cannot be more than thirteen hundred and fifty dollars involved in this suit Even though it were a controversy between citizens of different states, or even though it involved a question arising under the constitution or laws of the United States, there is not a sufficient amount in controversy to give this Court jurisdiction.

The first section of the act of August 13, 1888, which this Court has declared was passed for the purpose of restricting rather than enlarging such jurisdiction, defines explicitly the jurisdiction of circuit courts. Its language as to the value of the amount in controversy is unmistakable. The statute reads as follows: "Where the *matter in dispute* exceeds, exclusive of interest and costs, *the sum or value* of two thousand dollars." The plaintiff in this case alleges "that the *amount in dispute* in this cause exceeds, exclusive of interest and costs, *the sum of two thousand dollars*." The Court will notice the distinction between the provisions of the statute and the allegations of the complaint. Even though we should consider that this allegation of the complaint was a statement of fact rather than a conclusion of law, it is a statement of fact that is modified

by the subsequent allegations of the complaint. The law is well settled that in actions of ejectment, it is the *value of the property* in controversy which determines the jurisdiction of the Court. Indeed, the earlier cases held that even though damages for detention should be asked far greater than the sum allowed for the jurisdiction of the Court, yet the jurisdiction would still be measured by the value of the land.

Mr. Justice Washington, in an early case, decided that where the value of the land was not stated in the complaint, the cause would be dismissed for want of jurisdiction.

Lanning vs. Dolph, 4 Wash. C. C., 624.
Same case, 14 Fed. Cas., 1120.

And in the Eastern District of Michigan, Judge Longyear dismissed a case because the complaint nowhere alleged the value of the land, although it did allege damages for its detention many times beyond the amount necessary to give the Court jurisdiction. The Court said that damages were only incidental to a suit in ejectment, and that the main issue was the value of the land.

Crawford vs. Burnham, 1 Flipp. 116.
Same case, 6 Fed. Cases, 774.

This principle does not seem to be questioned. Under the Colorado Code, however, judgment may be recovered in the same action for the damages sustained as well as for the land in controversy, so that we believe it would be held here that if the amount of damages claimed for the detention was sufficient, the Court would be given jurisdiction.

This question, however, does not enter into this case. Our contention is that there is no allegation in the complaint as to the value of the land. The allegation is that the *amount in dispute* exceed two thousand dollars. *Amount* can only refer to the money claimed in the complaint. The words of the statute are "*matter in dispute.*" This may mean either the value of the thing in controversy or the sum of money claimed. This in shown by Congress following up the words "*matter in dispute*" by the words "*sum or value* of two thousand dollars." That is, where the matter in dispute exceeds the sum of two thousand dollars, or has a value in excess of that amount. The pleader in this case only referred to the money actually involved, because he uses the words "amount in dispute," which clearly means the one thousand dollars damages and the three hundred dollars expenses incurred in filing the adverse claim. If he had intended to refer to the value of the land, and had said that the matter in dispute exceeds the *value* of two thousand dollars, he might possibly have brought himself within the terms of the statute; but there can be no mistake in the meaning of the words used. "*Amount*" cannot possibly be held to refer to the value of a tract of land, but can only refer to some particular sum of money, and as we have a sum of money actually in dispute, to-wit: thirteen hundred dollars, that sum must limit and control the general allegation that it exceeds two thousand dollars.

The complaint suggests still another question. This suit involves, not the legal title to the land in controversy, but the mere possessory title. While

the possessory title may be of great value, yet it is not the legal title. This Court has decided, in a late case, that the possessory title is simply an inchoate right, which may some day ripen into full title or fade away into nothing.

Black vs. Elkhorn Mg. Co., 163 U. S., 445.

This Court and the land office have also decided that the judgment rendered is simply of an advisory character upon the land department, and does not necessarily carry with it a right to the legal title.

The Alice Placer, 4 Land Decisions, 314.
Perego vs. Dodge, 163 U. S., 160.

In a suit over the possessory title, where damages are claimed for its detention, what is the value of that title, separate and apart from the damages themselves? This is mining land, whose only value consists in the mineral contained in the ground. If a person takes possession of another's mining claim, and a suit arises out of that act, is the value of the land in controversy, or is it simply the value of the ore that was taken out by the person committing the trespass? In other words, is there any value to a possessory title aside from the profits arising from the possession? We do not believe there is. Here the complainants only claim that during the time the defendants were in possession of the tract of ground described in the complaint they damaged the plaintiff in the sum of one thousand dollars. Can it be claimed that anything else than this amount is in controversy in this suit? It may be that the land is worth several hundred thousand

dollars, but so long as neither party can show a legal title, but only claims the right to possess and enjoy it, can it be said that this value is in issue? We submit that, under the allegations of the complaint, it does not appear that there is two thousand dollars involved in this litigation.

III.

Is this a suit arising under the laws of the United States?

The plaintiff realizing that he cannot maintain the suit as one between citizens of different states also sets up that it is one arising under the constitution and laws of the United States. This presents a most important question. If the Court should hold that the complaint is sufficient upon the amount in controversy then the only question that remains to be settled is the one we are now discussing. Sections 2325 and 2326 of the Revised Statutes are as follows :

"2325. A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association, or corporation authorized to locate a claim under this chapter, having claimed and located a piece of land for such purposes, who has, or have, complied with the terms of this chapter, may file in the proper land office an application for a patent, under oath, showing such compliance, together with a plat and field notes of the claim or claims in common, made by or under the direction of the United States Surveyor-General, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent,

in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land office, and shall thereupon be entitled to a patent for the land, in the manner following: The Register of the land office, upon the filing of such application, plat, field notes, notices and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim; and he shall also post such notice in his office for the same period. The claimant at the time of filing this application, or at any time thereafter, within the sixty days of publication, shall file with the Register a certificate of the United States Surveyor-General that five hundred dollars worth of labor has been expended, or improvements made upon the claim, by himself or grantors; that the plat is correct; with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description, to be incorporated in the patent. At the expiration of the sixty days of publication the claimant shall file his affidavit, showing that a plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the Register and the Receiver of the proper Land Office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter.

"Section 2326. Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same,

and shall show the nature, boundaries, and extent of said adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy has been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment-roll with the Register of the Land Office, together with the certificate of the Surveyor-General that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the Receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment-roll shall be certified by the Register to the Commissioner of the General Land Office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the Court, to rightly possess. If it appears from the decision of the Court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim, with the proper fees, and file the certificate and description by the Surveyor-General, whereupon the Register shall certify the proceedings and judgment-roll to the Commissioner of the General Land Office, as in the preceding case, and patent shall issue to the several parties according to their respective rights. Nothing herein contained shall be construed to prevent the alienation of the title conveyed by a patent for a mining claim to any person whatever."

Congress says that adverse claims must be settled in a "court of competent jurisdiction." These words are used twice in Section 2326. Does the mere fact, that a suit brought to determine the possessory title to a lode mining claim upon the public domain is brought in support of an adverse claim filed in the land office, make it one arising under the constitution and laws of the United States? This question has been answered differently in different tribunals. In the Circuit courts of some of the districts comprising the Ninth Circuit it has been answered in the affirmative. In the Circuit courts of the Eighth Circuit it has always been answered in the negative. In the District of Colorado, Judge Hallett has always refused to take jurisdiction of an adverse suit simply because it was an adverse suit.

The cases cited in the brief of the plaintiff in error have all originated in the Ninth Circuit. It is clear under the authorities that possessory actions to recover mining claims, or to settle questions connected with a mere possessory title, are not suits arising under the laws of the United States, unless made so in the same way that other suits are made so, namely, by showing that it is necessary to construe some law of the United States to arrive at a correct decision, or that the parties are citizens of different states.

We will first look at this class of cases. Judge Sawyer, whose opinion is entitled to great respect on account of his experience in dealing with cases of this kind, early announced that these actions did not arise under the Federal statutes. We quote the following from his very able opinion:

"I have had no little difficulty in satisfactorily construing this act. In the broad sense claimed by some, nearly all cases relating to title to lands would be swept into the national courts; for in the new states, in every action of ejectment involving a question as to the real title, one party or the other goes back to a patent, or other grant under the laws of the United States. Since the passage of the act of Congress of 1866, and subsequent acts upon the same subject, expressly declaring the public lands to be free and open to exploration and occupation for mining purposes, subject to the local laws, regulations, and customs of miners; also, authorizing a sale and patent to parties establishing a right under such local laws, regulations and customs, it seems to be claimed, on this broad principle, that all suits relating to disputes about mining claims may be transferred to the national courts. But, clearly, the great majority of such cases only involve a litigation of precisely the same questions as were litigated in those classes of cases for the many years since the acquisition of California prior to the passage of those acts of Congress; and they turn upon no disputed construction of the constitution or statutes of the United States. In fact, where a patent is authorized to be issued to the possessor under these acts in a contested case, the statute refers the parties to the ordinary tribunals of the country to determine, under the local laws and customs, irrespective of the acts of Congress, which party is entitled to the mining claim, and the patent issues to the party so determined to have the right. (*Four Hundred and Twenty Mining Co. vs. Bullion Mining Co.* Case No. 2989.) Thus the rights of the parties are determined by the laws, regulations and customs of the locality outside the acts of Congress, without any discussion or controversy as to the construction of those acts. Since some of this class of cases transferred to this court were retained, but with no little hesitation, the Supreme Court of the United States has decided several cases, which afford a rule for the future, and which, it seems to me, exclude jurisdiction in many

cases which the bar appears to have supposed could be transferred. The case of *McStay vs. Friedman*, 92 U. S., 723, was a case in which one of the parties relied: 1. On the statute of limitations; 2. On title acquired through the City of San Francisco under the well-known Van Ness ordinance, and the act of the Legislature confirming it. On a writ of error to the state court, it was sought to sustain jurisdiction of the United States Supreme Court, on the ground that the title derived through the city depended upon the act of Congress of 1866 (14 Stat. 4), granting the land to the city in trust for those who held the ordinance of the city, state statutes, etc.

"The Court says: 'At the trial no question was raised as to the validity or operative effect of the act of Congress. * * * The city title was not drawn in question. The real controversy was as to the transfer of that title to the plaintiffs in error, and this did not depend upon the constitution or any treaty, statute of, or commission held, or authority exercised under the United States.' *Romie vs. Casanova*, 91 U. S., 380, is a similar case. At the present term of the Supreme Court, in a case which was actually transferred from the state court to this court, under section 2 of the act of 1875, the same ruling was made. One party claimed certain lots in San Francisco by virtue of possession, in pursuance of the provision of the Van Ness ordinance, and the statutes of the state, and of the United States, confirming said title; while the city claimed the same as being part of the public squares reserved and set apart for public purposes, in pursuance of the same ordinances and statutes. After the transfer a demurrer was interposed to the jurisdiction of this court, on the ground that it presented no question arising under the act of Congress, the rights of the parties depending upon the construction of the ordinances of the city and the state statutes alone. On the other hand, it was earnestly urged that it was necessary to construe the act of Congress in order to find out who the beneficial grantee intended by the act of Congress

was. The Court, however, held that the act of Congress referred the question as to who was entitled to the land to the city ordinances and the statutes of the state upon the subject, and that their rights must be determined by a construction of those ordinances and statutes. The Supreme Court affirmed this ruling at the present term, thus holding that the same principle adopted in relation to the section providing for writs of error to the state courts, is, also, applicable to cases of transfer from the state to the national courts under section 2 of the act of 1875; that is to say, that unless there is some contest as to the construction of the act of Congress, there is no jurisdictional question in the case. (*Hoadley vs. San Francisco*, 94 U. S., 4.)

"So with reference to mining claims. The act of Congress grants certain rights to those who discover, take up, and work mining claims. But it refers the parties to the local laws of the states and territories, and to the rules, regulations, and customs of miners of the districts where the mines are situated for the measure of their rights. If a dispute arises, as in the cases referred to, the act of Congress refers the parties to the ordinary tribunals, to determine it by the local laws and customs, and not by the act of Congress. Upon the trial of the right to a mining claim precisely the same questions are tried, and they are determined by the same laws and customs that are invoked as the measure of the rights of the parties before the act of Congress had been passed. Clearly, the great mass of these cases cannot involve the discussion or any dispute as to the construction of any act of Congress; and when they do not, under the decisions cited, this Court is without jurisdiction, so far as this provision of the act is concerned. Where the controversy is upon matters other than the construction of the constitution or an act of Congress, the 'correct decision' of such controversy cannot possibly 'depend upon the right construction of either.' No controversy can possibly arise upon the construction of an act of Congress, where all parties agree as to its construction. There may be

a contest as to other matters, but not as to the construction of the constitution or laws in such cases."

Trafton vs. Nouges, 4 Sawyer, 178.
Same case, 24 Fed. Cases, 123.

This decision of Judge Sawyer has been uniformly followed in all of the western states and territories, we think, without an exception.

Murray vs. The Blue Bird Mining Co., 45 Fed. Rep., 385.
Inez Mining Co. vs. Kinney, 46 Fed. Rep., 832.
Southern Pac. R. R. Co. vs. Whittaker, 47 Fed. Rep., 529.
Butler vs. Shafer, 67 Fed. Rep., 161.

It has received the sanction of this Court in a case which has become leading upon matters of jurisdiction.

Gold Washing Co. vs. Keyes, 96 U. S., 199.

In a number of later decisions to which we will call attention, the same principle has been announced.

We then can take it as settled that an ordinary action of ejectment or bill in equity to settle rights connected with a mere possessory title claimed under the mining laws is not cognizable in the Federal courts. Does the mere fact, that a judgment recovered in an action of this kind is made evidence by the Federal statutes for the purpose of conferring a United States patent, make any difference as to the jurisdiction of the courts? In other words, does the mere fact that such a suit is

brought in support of an adverse claim, make it a case arising under the constitution and laws of the United States? Let us look and see whether upon principle there can be any distinction between this class of cases and all other cases involving rights to mining claims.

The United States is the paramount owner of the public domain situated in the western states and territories. As such it is an ordinary land owner. It may keep or sell its land, just as it sees fit. From 1849 to 1866 it permitted its mineral lands to be occupied by its citizens, and those citizens to extract whatever valuable minerals were found therein. These persons were mere trespassers, and the Government at any time could have removed them and declared that it would reserve to itself all of the precious metals found in those lands. It could have adopted the system of leasing in vogue prior to that time; it could have worked the mines itself; it could have sold them, reserving a certain percentage, or taken any other course it might see fit. Until 1866 it did absolutely nothing. It tacitly permitted a system of law to spring up relating to the acquisition, holding and disposition of rights to the metals found in this land. All of the law relating to mines arising in this way depended wholly upon state and territorial statutes and the local rules and customs of miners. In 1866 Congress passed an act recognizing these local rules and regulations, giving them full force and validity and decreeing that a patent or the legal title might issue from the United States to persons who had fully complied therewith. Finally, in 1872, a more elaborate code of

laws was enacted, in which possessory titles were more thoroughly defined and legal titles made easier to obtain, and more certain and definite in their character.

These statutes of the United States simply recognize and enforce the law which the miners themselves had already enacted. The United States simply said to the trespassers upon its lands, that it had concluded to recognize their trespasses, to carry out the rules and regulations which they had made between themselves as trespassers, and convey to them the legal title. So far as possessory titles themselves were concerned, Congress did little or nothing. But two conditions are laid down in the Federal law concerning the acquisition of a possessory title. One is that there must be a discovery of mineral, and the other, that the claim must be marked upon the ground. The other provisions of the statute simply prescribe outside limitations as to the size of the claim; detail what shall be contained in a location certificate where one is required; and give to the owner of a claim, when properly located, the exclusive right of possession to the surface and of all lodes that apex therein. All other matters relating to the location of claims are relegated in express terms to the state Legislature and to the miners themselves in their mining districts. In Colorado, for instance, the essential requisites for the proper location of a mining claim are nearly all governed by state statutes. These state laws provide that, to locate a valid mining claim, there must first be a discovery of mineral; second, the posting of a notice; third, the sinking of a discovery shaft to a

depth of at least ten feet; fourth, the marking of the boundaries of the claim by six substantial posts; and, fifth, the preparation and filing of a location certificate. In the location certificate six essential features are required by statute, namely: first, the name of the lode; second, the name of the locator; third, the date of location; fourth, the number of feet along the lode in each direction from the discovery shaft; fifth, the general course of the lode; and, sixth, such a description of the claim as will identify it with reasonable certainty. The preliminary notice to be posted at the point of discovery must consist of a plain sign containing the name of the lode, the name of the locator, and the date of the discovery. Of all these various requirements necessary to make a valid location the Federal law requires but two—the making of a discovery and the marking of the boundaries. All of these other matters, and the marking itself, so far as details are concerned, are provided by state statute. It is very evident that in any controversy which may arise concerning the validity of a location the chances are ten to one that the question to be decided will be one solely of state law; and even under the Federal law the only question that can possibly arise at the present time is one of fact.

Can it be said that because in a suit brought to determine the rights to a mining claim it becomes necessary to construe a state statute that it therefore becomes a suit arising under the laws of the United States, because these state statutes derive their force and effect from an act of Congress? The state statutes, of course, are simply regulations made by the state, pursuant to a permission granted by the United

States. Ultimately they are to be tested by, and derive all their force from, Federal law. Can it not well be said that wherever it is necessary to construe the state statutes we have a suit arising under the laws of the United States? But we have seen that this Court, and all of the United States Circuit Courts that have ever passed upon the question, have uniformly held that such a suit is not one arising under the laws of the United States. It is a controversy to be settled by local tribunals, in accordance with local laws, and, unless it is one between citizens of different states, or unless it becomes necessary actually to construe the Federal statute, it cannot be brought in the courts of the United States. Does an adverse suit arise any more under Federal laws when only state laws or local rules and regulations are to be coustrued?

What is the true nature of an adverse suit? A person having a possessory title, secured to him by the Federal and the state law, desires to obtain the legal title. He applies to the owner of the soil, the United States, for a patent, which is nothing more nor less than an application to buy the land. It is an offer made by an intending purchaser to the owner. The owner has previously declared that he will sell the land upon certain conditions, and that the first one to comply with those conditions will have the right to purchase. In order to ascertain whether or not the conditions have been complied with, the owner says that he will advertise the application for a period of sixty days, and any person who desires to say that the applicant has not complied with the conditions may come in and say so. He must then bring a suit in some

court of competent jurisdiction to determine this question. The owner will do nothing with the application until that question is determined. Whoever is successful in this suit may bring the judgment-roll, and he will then convey the title. In accordance with this the advertisement is made. Some one comes in and asserts an adverse claim, and a suit is brought upon it. The United States being the proprietor, says that this suit must be brought in some court of competent jurisdiction. Is there any difference between the condition here required and the condition of complying with state laws in general? In other words, does the mere fact that the Government prescribes, as one of its conditions of purchase, that adverse claims must be settled in the courts, give to the Federal courts the power to try these cases any more than when it says rules and regulations made by the states and by the miners must be complied with, confer upon the Federal courts the right to determine in all controversies whether those statutes, rules and regulalations, have been complied with? In reason we cannot see any distinction between the two cases. Whether or not a person has sunk a discovery shaft, raises the question of whether or not he has complied with the laws of the State of Colorado. A discovery shaft is not required by the Federal law, but is required by the law of Colorado. Whether he has complied with this requirement is a matter which may arise in any litigation concerning a possessory title. It may be the sole question in an adverse suit or it may be the sole question in an ordinary action of ejectment. Does the fact that the judgment may be used as evidence in an

application for patent, make any difference as to the jurisdiction of the tribunal that is to determine it?

The same questions may arise upon an application for patent without a law suit. The United States requires evidence that a discovery shaft has been sunk, whether it comes in the shape of a judgment, or whether it comes in the shape of testimony by witnesses. When we look at the object and purposes of the statute, we can see no distinction in principle between an adverse suit and any other suit involving title to mining lands. The judgment in an adverse suit is simply made evidence of the fact that an applicant for a patent has complied with the state and federal statutes. It is simply one element in the application for a patent. The United States simply requires the adverse claimant to bring it or waive any claim to the ground.

Looking at the statute itself we see that Congress was very careful not to confer jurisdiction in these cases upon the Federal courts. It was very careful to use the words "courts of competent jurisdiction." In other similar cases Congress has conferred jurisdiction upon the Federal courts. For instance, when it created the Bank of the United States the charter of the bank provided that the bank could sue and be sued in all state courts of competent jurisdiction, and in any Circuit Court of the United States. This Court held in an opinion which has become a classic that by virtue of this provision the bank could be sued in the Federal courts.

Osborn vs. United States Bank, 9 Wheat., 738.

The Court will note the words, "courts of competent jurisdiction," were even then being used by Congress. In that particular case Congress expressly provided that both the state courts and the Circuit Courts of the United States should have jurisdiction." In the statute at bar no such provision is found. We simply have the term "courts of competent jurisdiction." In the course of his opinion in the above cause, Chief Justice Marshall said: "It is said that a clear distinction exists between the party and the cause; that the party may originate under a law with which the cause has no connection; and that Congress may with the same propriety give a naturalized citizen, who is the mere creature of a law, a right to sue in the courts of the United States as give that right to the bank. This distinction is not denied; and if the act of Congress was a simple act of incorporation and contained nothing more it might be entitled to great consideration." It seems to us that the statute under consideration comes within this distinction. Congress, as in this instance, simply said that the party succeeding in a court of competent jurisdiction may present his judgment-roll and have a patent. The *cause of action itself* does not arise under the laws of the United States any more than any other cause of action relating to a mining controversy. It is simply the fact that the decision may be evidence that a party is entitled to a patent that makes the action different from any other. It is the character of the parties litigant, and not the subject matter of the controversy which makes the suit an adverse suit rather than one concerning mere possessory rights. For the sole reason that

the parties are asking the Government of the United States for a legal title, it is termed an adverse suit.

As already stated, in the District of Colorado, the Circuit Court has uniformly held that cases of this kind cannot be brought in the Federal courts merely because they are of this class. Any other ruling would simply swamp the Federal courts of that district with business. Nearly two thousand adverse suits have arisen from the Cripple Creek mining district alone, and within the past three or four years. The great bulk of these would have been brought in the United States Court if it were possible to bring them there. It is safe to say that at least fifteen hundred cases would have been filed in the Federal courts from Cripple Creek alone, and yet the entire Federal docket in Colorado, since it was admitted as a state, has not reached four thousand cases.

Let us look at the reasons given by the various Circuit Courts which have held that cases of this kind may be brought in the Federal courts. The most important case is that of *Burke vs. The Bunker Hill Mg. Co.*, 46 Fed. Rep., 644. This was a suit tried by Judge Sawyer, then Circuit judge, and Judge Beatty, District judge for the District of Idaho. The opinion upon this point was delivered by Judge Sawyer. His Honor conceded that as a matter of first impression the Federal courts would not have jurisdiction, but he thought that the amendment to Section 2326, made in 1881, might change his views, and, in any event, that he ought to follow what he conceived to be the rulings made by Mr. Justice Miller, Mr. Justice Brewer, and, inferentially, some of the decisions of this

Court. We quote the following from Judge Sawyer's opinion:

"It seems to us, that all the authorities, as they now stand, have determined the question in favor of the affirmative of this proposition. Thus the point was directly decided on the circuit on a motion to remand, this being the only point on the motion, by Mr. Justice Miller of the Supreme Court, in *Frank G. & S. M. Co. vs. Larimer M. & S. Co.*, 8 Fed. Rep., 724. A like decision was made by Justice Brewer, then Circuit Judge, in *Cheesman vs. Shreve*, 37 Fed. Rep., 36. So the same ruling was made by Knowles, J., in *Strasburger vs. Beecher*, 44 Fed. Rep., 213. Says the Judge:

> 'As to this suit, I am clearly of the opinion that it is one which arises under the laws of the United States. It is a suit instituted in pursuance of the provisions of Section 2326 of the Revised Statutes of the United States. See *Frank G. & S. M. Co. vs. Larimer M. & S. Co.*, 8 Fed. Rep.. 724. One of the objects of such an action is to determine who is entitled to a patent to the premises in dispute. The judgment is filed in the United States land office on the determination of the action. To some extent the United States is a party to the action. *See Jackson vs. Roby*, 109 U. S., 440. 3 Sup. St. Rep., 301. This decision must be based upon the theory, it appears to me, that the action, pursuant to an adverse claim, has for one of its objects the determination as to whether either party has divested the United States of the possessory title to the premises in dispute.'

"That is to say, it is not only intended to determine the rights of the two parties as *between themselves, but also as between each of the parties and the United States, so as to determine* finally whether either party has so far performed the conditions prescribed by the statute as to entitle him to pay for the mine and receive a patent from the United States, *thereby making the United States*

substantially, though not formally, a party to the suit, and *entitled to have their rights determined in the national courts.* This idea is supported by the amendment to Section 2326 of 1881 (1 Supp. Rev. St., 609), which provides as follows:

> 'That if, in any action brought pursuant to section twenty-three hundred and twenty-six of the revised statutes, title to the ground in controversy *shall not be established by either party; the jury shall so find, and judgment shall be entered according to the verdict.* In such cases costs shall not be allowed to either party, and the claimant shall not proceed in the land office or be entitled to a patent for the ground *in controversy until he shall have perfected his title.*'

"It would seem that, under section 2326, as it originally stood, when a party applied for a patent to a mine, and there was an adverse claimant, the parties were referred to the ordinary courts to determine in the usual actions, applicable to the cases, the rights of the adverse claimant, only as between themselves; such as an action to recover possession, and a suit to determine an adverse claim when in possession; the question between the successful party and the Government being left to the determination of the Commissioner of the Land Office. But the amendment seems designed to change the whole proceedings, and refer, not only the question of the rights of the parties as between themselves, but also, without making the United States formally a party, to transfer the whole matter, as between the United States and the successful party, to the courts, thereby making the United States substantially, though not formally, parties to the suit; and, on that ground, it would seem that the United States are entitled to have their rights determined in the national courts. *Jackson vs. Roby*, 109 U. S., 444; 3 Sup. Ct. Rep., 301, and *Wolverton vs. Nichols*, 119 U. S., 485; 7 Sup. Ct. Rep., 289, seem to support the idea, also, that not only the rights of the parties, as between themselves, but, also, the

rights, as between the parties, respectively, and the United States are to be conclusively determined. These rulings, cited from the Federal Reporter, appear to be sustained by the Supreme Court of the United States, in *Chambers vs. Harrington*, 111 U. S., 350, 4 Sup. Ct. Rep., 428, where the Supreme Court entertained an appeal, apparently, because it was an action brought under section 2326, Rev. St. See also *Doe vs. Mining Co.*, 43 Fed. Rep., 219. Whatever we might think, were this a case of first impression, arising under section 2326 *before its amendment* we do not feel at liberty now to question the ruling of so many cases decided by eminent judges, and by the United States Supreme Court, as we understand their decisions. We, therefore, hold upon these authorities, that the record shows a case for national jurisdiction, as arising under the laws of the United States for the reason, that it was brought in pursuance of the requirements of section 2326, as amended, and, therefore, it is not within the decisions of *Trafton vs. Nougues*, 4 Sawy., 178, and *Water Co. vs. Keyes*, 96 U. S., 199, and cases following those decisions. These jurisdictional facts all appear in the pleadings, and are not required to be otherwise shown in the request, or petition, to transfer to this court."

Burke vs. Bunker Hill Mg. Co., 46 Fed. Rep., 644.

Let us consider the cases relied upon in the language just quoted. The first is that of *The Frank Mg. Co. vs. The Larimer Mg. Co.*, 8 Fed. Rep., 724. This was a decision by Mr. Justice Miller. Instead of deciding the exact point as stated by Judge Sawyer, Mr. Justice Miller decided nothing of the kind. Judge Miller simply held that any mining suit must necessarily depend upon the mining laws of Congress, and the Federal courts, therefore, had jurisdiction of them. The question of whether or not an adverse suit is different from

any other kind of a mining suit was never presented, argued or considered. The same thing is true of the decision quoted of Mr. Justice Brewer, at that time Circuit judge.

Cheesman vs. Shreve, 37 Fed. Rep., 36.

That was not an adverse suit and the only point decided by Judge Brewer was that in a suit where it would be necessary to construe section 2322 of the Revised Statutes giving to the owner of the apex of a vein the right to go under an adjoining property a federal question was presented. We quote Judge Brewer's opinion in full to show that this was the only point involved, and also to show that his construction of Judge Miller's opinion is the same as ours:

"These defendants are entering beneath the surface, within the side lines of ground patented to complainants, and seeking to mine and take ore therefrom. *Prima facie* they are trespassers. They justify this entrance under authority of the laws of the United States and especially section 2322 of the Revised Statutes, which give to the owner of a vein, lode, or ledge, the top or apex of which lies within the surface lines of his own location, the right to follow that vein downward, outside of the side lines of his location, and into territory whose surface belongs to another. Involved in their claim is the question whether there is such a vein as is provided for in that section; a question as to the right of entrance, as affected by the priority of location and the dip of the vein. These questions are presented, and, whatever may be the true answer thereto, it is obvious, from past judicial expressions, that they cannot be considered as mere sham, or pretended, but as real substantial questions. Hence, as questions arising under the laws of the United States, they present a case cognizable

by the Court. *Mining Co. vs. Larimer Co.*, 8 Fed. Rep., 724; *Starrin vs. New York*, 115 U. S., 248, 6 Sup. Ct. Rep., 28. As the defendants are entering within the side line of complainant's property, *prima facie* they are trespassers; and where the affidavits, upon an application for a preliminary injunction are conflicting, the rule is to preserve the possession as against such *prima facie* trespassers by a preliminary injunction, leaving the question of title to the property to be established by a suit at law. Temporary injunction will issue upon the giving of a bond in the sum of $25,000, conditioned according to law."

Cheesman *et al.* vs. Shreve *et al.*, 37 Fed., 36.

The next case cited by Judge Sawyer is *Strasburger vs. Beecher*, 44 Fed. Rep., 213, a decision by Judge Knowles in the Circuit Court for Montana. Judge Knowles did hold in that case that an adverse suit was one arising under the laws of the United States. But he based this ruling upon what he conceived to be Judge Miller's holding in the eighth Federal and the holding of this Court in *Jackson vs. Roby*, 109 U. S., that the United States was in a measure a party to the suit.

We will shortly call attention to *Jackson vs. Roby*.

Doe vs. Mining Co., 43 Fed. Rep., 219, is next cited by Judge Sawyer. That was a decision of Judge Ross in the Circuit Court for the Southern District of California. The only point necessary to decide in that case was that an adverse suit might be brought on the equity side. The case was afterwards affirmed by the Circuit Court of Appeals, but nothing was then said with reference

to an adverse suit being one that necessarily arose under the laws of the United States.

In addition to the above cases, Judge Sawyer relied upon three decisions of this court: *Jackson vs. Roby*, 109 U. S., 440; *Chambers vs. Harrington*, 111 U. S., 350; and *Wolverton vs. Nichols*, 119 U. S., 485.

It is thus seen, from this examination of his opinion, that Judge Sawyer had changed his views from what he held in *Trafton vs. Nougues*. The reason for the change, as stated by him, was to conform to these new cases, but when examined the cases do not decide what he thought they did. Neither Judge Brewer nor Judge Miller have passed upon the proposition which was before Judge Sawyer and are no authority for his position. We will presently see that this court, instead of supporting Judge Sawyer's view, has decided exactly the reverse.

The only other case that needs mention is a decision of the Circuit Court of Appeals for the Ninth Circuit, affirming Judge Beatty's decision in the case of *Rutter vs. Shoshone Mining Co.*, 75 Fed., 37. The court consisted of Judges Gilbert and Ross, Circuit Judges, and Hawley, District Judge. The court divided upon this question—Judges Ross and Hawley holding that the Federal court had jurisdiction, while Judge Gilbert held that it had not.

Shoshone Mining Co. vs. Rutter, 87 Fed. Rep., 801.

Under the decision of this Court the Circuit Court of Appeals, instead of deciding the question

of jurisdiction, should have certified that point to this tribunal.

United States vs. Jahn, 155 U. S., 109.
Robinson vs. Caldwell, 165 U. S., 359.

It is substantially held in these two cases, that a Circuit Court of Appeals, under the act creating it, has no right to pass upon the question of the jurisdiction of United States courts, but should always certify that question to this Court. But the court did decide the point and this decision as an argument for or against the jurisdiction is to be considered.

We think if the Court will compare Judge Hawley's opinion sustaining the jurisdiction with Judge Gilbert's dissenting opinion, it will be convinced that Judge Gilbert has the better of the argument. Judge Hawley simply goes over the cases to which we have called attention, and which were relied upon by Judge Sawyer. He relies upon Judge Miller and Judge Brewer and the other decisions just referred to. As already indicated, none of these sustain the point in favor of which they are cited. Judge Gilbert, on the other hand, rests his opinion upon the decision of this Court in *Bushnell vs. Smelting Co.*, 148 U. S., 682, and there can be no escape from the logic of his opinion. This Court decided in that case, as we will presently show, that no Federal question was necessarily at issue in an adverse suit. As Judge Gilbert well says, the plaintiff in a cause must show that a Federal question is in issue. If the contention of plaintiff in error is correct, then the only Federal question is that the suit is an adverse suit brought in support

of an adverse claim, and this must necessarily appear upon the face of the complaint. This did appear upon the face of the complaint in the Bushnell case, yet this Court held that no Federal question was presented, and that, therefore, it had no jurisdiction to review the action of the Supreme Court of Colorado.

These are the only cases that we know of which sustain the jurisdiction. Let us now look at the other side.

The State Court of Nevada passed upon a case shortly after the law of 1872 was passed. The opinion of the Court was delivered by Judge Hawley, then of the Supreme Court of Nevada. Judge Hawley, in the course of his opinion, said:

"Congress did not, by the passage of this act, or by the acts passed July 26, 1866, and July 9, 1870, confer any additional jurisdiction upon the state courts. The object of the law, as we understand it, was to require parties protesting against the issuance of a patent to go into the state courts of competent jurisdiction and institute such proceedings as they might, under the different forms of action therein allowed, elect, and there try 'the right of possession' to such claim, and have the question determined. The acts of Congress do not attempt to confer any jurisdiction not already possessed by the state courts, nor to prescribe a different form of action."

The 420 Mining Co. vs. The Bullion Mining Co., 9 Nev., 240.

This is a contemporaneous construction of the statute by a Court that was probably in a better position to know what the framers of the law intended than any other Court in the United states.

And in a controversy between these same companies, a few years later, Judge Sawyer announced the same thing. He said:

"After a careful consideration of the acts of Congress set out in the statement of the case, it is clear to my mind that it was the intention of Congress to give the right of purchase of a mining claim to a silver or gold bearing lode or vein, to the person or association of persons who, in pursuance of the laws of the state or territory and the local mining customs, rules and regulations of the place where located, recognized by the laws and enforced by the courts, is the owner and entitled to the possession as against everybody except the Government of the United States. It will be seen that the act expressly refers to, and recognizes, the laws of the state or territory, the local customs, rules and regulations not in conflict with the laws of the United States, the decisions of the courts, and even, in express terms, the state and territorial statutes of limitation applicable to the subject. The act requires the party seeking a patent to file a diagram of the claim, and post a copy in a conspicuous place on the claim, together with a notice of intention to apply for a patent, and requires the register of the land office, also, to publish a notice of the same, in a newspaper published at the nearest place, for ninety days. It then authorizes the adverse claimant, before approval of the survey, to file a protest, upon which all proceedings are stayed 'until final settlement and adjudication, in the courts of competent jurisdiction, of the rights of possession to such claim, when a patent may issue as in other cases.' *That adjudication is to be had in the ordinary courts, and to be determined under the ordinary rules, regulations, customs and laws of the locality. It seems impossible to come to any other conclusion than that the party who at the time can maintain his right to the claim in the courts of the country* as against any person but the United States, under the local laws, customs, rules and regulations, is the party upon whom Con-

gress intended to confer the right to purchase, no matter how that right originated, *if, under such laws and customs and decisions of the courts*, he has the present right. And this is simply a right to purchase—a privilege given to the party, of which he may avail himself or not, exactly like a pre-emption law, and founded upon similar reasons and policy. And what this privilege is is stated in the cases of *Hutton vs. Frisbie*, 37 Cal., 479, and *Frisby vs. Whitney*, 9 Wall., 76 U. S., 191. The case is in no wise like the case of an inchoate, imperfect Spanish grant, but is in all respects like a case under the pre-emption laws.

"The object of a determination of the right by litigation, where there is an adverse claim, is simply to ascertain the party who has the right to the claim *under the laws of the state and local rules and customs*."

The 420 Mining Company vs. The Bullion Mining Company, 3 Sawyer, 634.

Same case, 9 Fed. Cases, 592.

The italics are ours. Judge Sawyer at that time believed that it was *impossible to come to any other conclusion* than that the state courts were the ones to try these cases. This was the universal understanding. It is only within the last few years that the idea has taken root that the Federal courts had jurisdiction.

Judge Hallett has always held, in the District of Colorado, that the Federal Courts were not clothed with jurisdiction of such suits *per se*, and we understand this has been the rule in all the districts of the Eighth Circuit. We thus have the Eighth against the Ninth Circuit, and the earlier rulings in the Ninth agreeing with the Eighth.

But the decisions of this Court would seem to leave little or no doubt upon the proposition. *Jackson*

vs. Roby, 109 U. S., 440, which is so much relied upon, was an adverse suit brought between citizens of different states in the Circuit Court of the United States for the District of Colorado. There was never any question raised as to the jurisdiction of the United States Court generally of adverse suits, nor was it necessary. The parties in the case were citizens of different states. But the point determined in the case involved a construction of Section 2324 of the Revised Statutes and presented a case arising under the laws of the United States, independent of any other consideration, and of whether or not the suit was brought in support of an adverse claim. The only point determined was as to what work could be counted for the mutual benefit of a group of claims.

Chambers vs. Harrington, 111 U. S., 350, is cited in support of the proposition that the Federal courts have jurisdiction; but an examination of that case will show that this point was really not determined. That was an appeal from the Supreme Court of the Territory of Idaho. It came to this Court by virtue of being an appeal from the Supreme Court of a Territory, and, like any other case of a similar nature. So far as that case decides anything, it is in favor of the position maintained by us Mr. Justice Miller in deciding the point said:

"It is now urged that such a judgment is not subject to review in this court, and the appeal should be dismissed.

"But it is apparent that the statute requires a judicial proceeding in a competent court. *What is a competent court is not specifically stated, but it undoubtedly means a court of general jurisdiction,*

whether it be a state court or a Federal court; and as the very essence of the trial is to determine rights by a regular procedure in such court, after the usual methods, which rights are dependent on the laws of the United States, we see no reason why, if the amount in controversy is sufficient in a case tried in a court of the United States, *or the proper case is made on a writ of error to a state court,* the judgment may not be brought to this court for review as in other similar cases."

Chambers vs. Harrington, 111 U. S., 350.

The Court will note that Mr. Justice Miller is very careful not to say that actions of this kind may be brought in the Federal courts in the first instance. He says the statute means a court of general jurisdiction, whether it be a state court or a Federal court; and when it comes to a test between state and Federal jurisdiction, he seems to think that the case is governed by the rules relating to all other kinds of cases, as he says, in conclusion, that to bring a case from a state court to this Court, a proper case must be made. The words "*proper case*" show that there is no distinction between an adverse suit and any other suit when it comes to the jurisdiction of the Federal courts.

Wolverton vs. Nichols, 119 U. S., 485, is also cited as authority. But an examination of that case will show that this question was not involved. That, like *Chambers vs. Harrington*, was brought to this Court by a writ of error to the Supreme Court of a territory, the territory in that case being Montana. Like *Chambers vs. Harrington*, it is governed solely by the law relating to territorial courts.

The only case in which this Court ever passed upon the point in issue was—

Bushnell vs. Crooke M. & S. Co., 148 U. S., 682,

and that is squarely in favor of our contention. That was a suit brought in the state courts of Colorado. Upon being brought it was removed into the Circuit Court of the United States. Judge Hallett then remanded the case back to the State courts; it was tried in the State courts; the unsuccessful party appealed to the Supreme Court, and that court affirmed the judgment of the lower court. A writ of error was then sued out from the Supreme Court of the State of Colorado to this court. The defendant in error moved to dismiss the writ upon the ground that this court had no jurisdiction. It will be seen that the exact point in controversy here was involved in that case. The Court dismissed the writ of error, saying that the case clearly presented no Federal question, nor was one necessarily involved in the suit itself.

Bushnell vs. Crooke Mining & S. Co., 148 U. S., 682.

The conclusion of the Court in that case is conclusive of the present one. If no Federal question was necessarily involved in that suit, none is necessarily involved in any adverse suit. That was an adverse suit of the same character as the present one, and the conclusion of the Court that it had no jurisdiction is conclusive of the case at bar. This court has also decided that a mere mining controversy does not necessarily present a Federal question, and that a suit concerning such a controversy is not one arising under the laws of the United States.

Colorado Central Co. vs. Turk, 150 U. S., 138.

Gillis vs. Stinchfield, 159 U. S., 658.

Indeed, section 910 of the Revised Statutes expressly provides that possessory actions of this kind shall not be affected by the fact that the paramount title remains in the United States.

And this Court has announced practically the doctrine of the Supreme Court of Nevada, that these adverse cases are to be tried by the local state tribunals. Mr. Justice Miller says:

"It is true that there are no very distinctive words declaring what kind of adverse claim is required to be set up as a defense against the party making publication; but, throughout the whole of these sections, and the original statute from which they are transferred to the Revised Statutes, the words 'claim' and 'claimant' are used. This word is, in all legislation of Congress on the subject, used in regard to a claim not yet perfected by a title from the Government by way of patent. And the purpose of the statute seems to be that, where there are two claimants to the same mine, neither of whom has yet acquired the title from the Government, *they shall bring their respective claims to the same property, in the manner prescribed in the statute, before some judicial tribunal, located in the neighborhood where the property is, and that the result of this judicial investigation shall govern the actions of the officers of the Land Department in determining which of these claimants shall have the patent*, the final evidence of title, from the Government. This view is consistent with the entire statute on the subject, and some of its language is inconsistent with the idea that any contest to be thus decided is between a party who already has the legal title to the property which he claims, and some other party, who is only setting up a claim to the same property."

Iron Silver Mining Company vs. Campbell, 135 U. S., 286, 289.

The italics are ours, and show how the Court regards actions of this kind. How can a local

tribunal of the neighborhood decide these controversies if they can be brought in a Federal court hundreds of miles away? The land offices are more numerous, and nearer the neighborhood, than the Federal courts.

Mr. Lindley in his late and very excellent work upon mines, says that the Federal courts undoubtedly have jurisdiction of these cases, and he bases this upon two grounds, and suggests a third. Let us note what his grounds are. He states them as follows:

"(1). The questions involved necessarily arise under the laws of the United States, and are essentially Federal in their nature.

"(2). The tribunal is one of the only class of courts upon whom Congress has the power to confer jurisdiction.

"A third reason is also suggested, viz.: the United States is necessarily a *quasi* party to the action."

2 Lindley on Mines, Sec. 747.

Let us take up these reasons for a few moments. The first one is that the questions involved necessarily arise under the laws of the United States and are essentially Federal in their character. This is but a simple begging of the question. It is simply a statement that the case is one arising under the laws of the United States because it arises under those laws. But we have seen that this is not true of mining controversies in general. While in a sense they necessarily arise under the laws of the United States because the paramount title to the ground is in the United States and laws for the acquisition of title must be

laws of the United States, at the same time it is held that where those laws have been construed and where it is not necessary for a new construction, or where the only laws involved are state laws, that the case is not one to be brought in the Federal courts. So that Mr. Lindley's first reason amounts to nothing.

His second reason is that the tribunal is one of the only class of courts upon whom Congress has the power to confer jurisdiction. And with this reason is the other suggested that the United States is a *quasi* party to the action. If these reasons are good for anything, they mean that the Federal courts have exclusive jurisdiction. If the United States is a party to the action, or if the court must be one over which the United States has control, then the Federal courts are the only ones which can hear and determine controversies of this kind. But both positions have been decided against Mr. Lindley's reason, both by this Court and other Federal tribunals. This Court has decided that the United States is not a party to the action, is not bound by the judgment, and that the only effect of the judgment is to make it evidence, and the land office is to use it simply as one of the links in the chain of title presented by the party applying for the patent.

Perego vs. Dodge, 163 U. S., 160.
Last Chance Mg. Co. vs. Tyler Mining Co., 157 U. S., 683.

And the land office has decided in a number of cases that notwithstanding the judgment rendered in the courts, it has still the right and it is

the duty of its officers to determine whether or not the applicant has complied with the Federal law and is entitled to a patent.

The Alice Placer, 4 Land Decision, 314.
Aurora Lode vs. Bulger Hill and Nugget Gulch Placer, 23 Land Decisions, 95.

The latter case is very instructive for the reason that an adverse suit had been brought to determine a controversy between a placer owner and a lode owner. The owner of the placer had won and was given a decree for the ground in controversy. That judgment was affirmed by this Court.

Bennett vs. Harkrader, 158 U. S., 441.

But the land office said that notwithstanding the decision of this Court the placer applicant was not entitled to the ground, that he was only entitled to his placer ground as such, and that the lode owner was still entitled to his lode claim.

In regard to the proposition that the Federal courts are the only ones upon which Congress has the right to confer jurisdiction, it is only necessary to say that Congress is not conferring jurisdiction by this statute upon any court. It is simply providing that a person applying for a patent upon land must settle any adverse rights which may exist relating to his possessory title in some court of competent jurisdiction before the patent will issue. This possessory title is one which depends upon state legislation and local rules and customs of miners. Its ownership may be fought out in any tribunal of competent jurisdiction. Congress does not *confer jurisdiction* upon state courts or upon

Federal courts to determine any question, and does not attempt to interfere with or regulate state courts in the slightest degree. It imply says to an adverse claimant: "If you have any rights in this land arising under the laws of the state or the local rules and customs of miners, you must settle those rights before some competent tribunal, and bring to the proper officer a certified copy of the judgment-roll showing that those rights have been settled." Instead of the statute conferring jurisdiction upon a court, it simply requires of the applicant the performance of a certain condition.

The adverse claimant is not required to bring his suit; he may either sue for or waive his claim. The application for a patent is in the nature of a proceeding *in rem*. The applicant is required to give notice to the world, and parties having adverse claims may either assert them or keep still. If they do assert them, they must procure, for the guidance of the Land Department, proof of a certain kind, and within a certain time. One of the kinds of proof required by the statute is a certified copy of a judgment-roll in certain instances, but is nonsense to say that because this character of proof is required that Congress is thereby conferring jurisdiction upon a particular court to secure it. Congress has nothing to do with the court; the Land Department has nothing to do with the court. The United States simply suspends action until the machinery of the court has been put in motion and its decision has been rendered.

In regard to Judge Sawyer's reason for changing his mind, this Court has answered it conclusively. Judge Sawyer thought that the amendment

of 1881 made the United States a party to the action, and that while under the original action these cases must be tried in the state courts, under the amended act the Federal courts had jurisdiction. This Court, however, has explained that the act of 1881 changed nothing except to direct that *the courts should determine whether either party was entitled to possession.* Under the ordinary rules of procedure if a plaintiff failed to make out his case in an action of ejectment the defendant was entitled to judgment. Thus in an adverse suit a defendant would get a judgment for possession without proving any compliance with the law of possessory rights. This judgment would entitle him to a patent from the Government. Congress simply sought to correct this condition of affairs and compel the party getting the judgment to prove his possessory title It was never intended to make the United States a party or preclude its rights in the slightest degree. This is made clear by this Court. Thus, Chief Justice Fuller says:

"We do not think the intention of this act was to change the methods of trial. Its manifest object was to provide for an adjudication, in the case supposed, that neither party was entitled to the property, so that the applicant could not go forward with his proceedings in the land office simply because the adverse claimant had failed to make out his case, if he had also failed. In other words, the duty was imposed on the Court to enter such judgment or decree as would evidence that the applicant had not established the right of possession, and was for that reason not entitled to a patent. * * * It must be remembered that it is 'the question of the right of possession' which is to be determined by the courts, and that the United States is not a party to the proceedings. The only jurisdic-

tion which the courts have is of a controversy between individual claimants, and it has not been provided that the rights of an applicant for public lands as against the Government may be determined by the courts in a suit against the latter. *United States vs. Jones*, 131 U. S., 1; *Last Chance Mg. Co. vs. Tyler Mg. Co.*, 157 U. S., 683, 694."

Perego vs. Dodge, 163 U. S., 160.

Had these views of this Court been announced when Judge Sawyer considered the case of *Burke vs. Bunker Hill Mining Co., supra*, he would probably have reached a different conclusion and adhered to his former decisions. However that may be, it is clear that every reason advanced by courts or text writers for conferring jurisdiction on the Federal tribunals has been conclusively answered by this Court.

The inconvenience and injustice of giving to Federal courts jurisdiction of this class of cases, irrespective of parties or the questions involved, is readily apparent. Congress has provided land offices all over the western states and territories. The object is to provide a cheap and convenient method of acquiring title to lands. If a suit is necessary to determine the possessory title, the same conveniences should be given to suitors. Mining properties are always located in mining counties, where juries, familiar with the subject, can be obtained. The Federal courts are generally located in populous cities, where juries are drawn from the cities themselves, or from the surrounding agricultural country. They are usually at a long distance from the residence of the owners of mining claims. The state of Colorado is much larger than all New England; it is hun-

dreds of miles from many of the mining counties to the city of Denver or Pueblo, where the United States courts are held. The expense of coming to Denver to try an adverse suit and of bringing witnesses, will practically preclude the bulk of the owners of mining claims from any trial whatever. If, on the other hand the state courts are permitted to try this class of cases, the suits can be brought in the county wherein the property is located; the witnesses all reside at or near the county seat; a jury of miners can be obtained; they are permitted to view the premises and the case will be decided according to the very right of the cause. We know of no instrument of oppression greater than the right of a wealthy suitor to bring a mining case in the United States Court when his opponent is a poor man. A wealthy litigant can summon his expert witnesses who are able to testify upon the stand with a confident and convincing air that is almost certain to carry the day with a jury drawn from an agricultural region. The other party can only bring a few of his fellow-miners. The distance from the property precludes the idea of a jury making a personal examination. But if the case is tried in a mining camp, this expert testimony will be in vain before a jury composed of miners who are permitted to go and examine the property. We do not believe that Congress intended that this condition of affairs should exist. While it may be true that this disadvantage always results where one party is wealthy and the other poor, and that this condition of affairs does not always exist, yet the fact is that it is almost certain to exist in a large number of cases, and it will certainly spring

into existence much more rapidly when it is once known that all these suits can be brought in the Federal courts.

The limitation that a suit must involve two thousand dollars is no limitation at all. No one has ever located a mining claim in any of the western states and territories, but what he was willing to testify that its value was largely in excess of two thousand dollars. That is one proposition upon which both sides of every adverse suit will be unanimous. So that if this Court should hold that the Federal courts have jurisdiction of all adverse suits simply because they are adverse suits, it means that all of these cases can be brought in the United States courts. We do not believe that such is a fair construction of the statute. We believe that the matter has been decided adversely in the case of *Bushnell vs. the Smelting Company*, and we confidently believe that this Court will adhere to this decision.

Respectfully submitted,

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